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STATE OF WISCONSIN
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DISTRICT I

Appeal Case No. 2022AP002112-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs.

LAQUANDA N. STRAWDER,

Defendant-Respondent.

ON NOTICE OF APPEAL TO REVIEW A DECISION AND
ORDER TO SUPPRESS EVIDENCE ENTERED IN THE
CIRCUIT COURT FOR MILWAUKEE COUNTY, THE
HONORABLE JONATHAN D. RICHARDS, PRESIDING

RESPONSE BRIEF OF PLAINTIFF-APPELLANT

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ISSUE PRESENTED

Is a finding of probable cause supported in a situation where a law enforcement officer encounters: (a) a vehicle with extensive front end damage, (b) a number of street signs taken down while the vehicle appeared to have driven up over a cul-de-sac, (c) airbags deployed on the vehicle, (d) the vehicle found at a dead stop in the middle of two lanes of traffic, (e) the time of the car accident was approximately 2 am after the driver had been to a party at a friend's home, (f) the driver's version of the accident ran contrary to the physical evidence, (g) the driver told repeated lies to deceive the officer about her alcohol consumption, (h) the driver had glossy eyes, (i) the driver failed a series of several field sobriety tests, and (j) the driver had two prior drunk driving convictions?

Circuit Court Answered: NO.

This Court Should Answer: YES.

RESPONSE TO FACT AND ARGUMENT SECTIONS

A. *Response to Defense's Fact Section*

The facts in this case are important since the main issue is whether Officer McLean had probable cause to arrest. In the fact section of its response brief, the defense stipulates to several facts supporting probable cause, including:

- 1) **Engagement of Law Enforcement.** A citizen flagged down Officer McLean.
- 2) **Auto Accident as Lawful Reason for Stop and Investigation.** Citizen reported a motor vehicle accident, directing Officer McLean "up the street" to the location.
- 3) **Serious Nature.** Ms. Strawder's vehicle suffered extensive front-end damage.
- 4) **Initial Encounter.** Ms. Strawder was not standing on the sidewalk out of traffic. Rather, she stood in the street.
- 5) **Explanation of Accident.** Ms. Strawder reported she was driven off the road by another vehicle.

- 6) **Vagueness of Explanation.** Ms. Strawder could not describe the alleged second car nor provide details about how the accident occurred.
- 7) **Denials of Alcohol Consumption.** Officer McLean asked Ms. Strawder if she consumed alcoholic beverages during the evening. Ms. Strawder twice denied drinking alcohol.
- 8) **Admission of Alcohol Consumption.** Ms. Strawder later admitted drinking an alcoholic beverage prior to driving her motor vehicle.
- 9) **Field Sobriety Tests.** On the HGN, Ms. Strawder showed five out of six clues. On the Walk & Turn test, she failed it. On the One-legged Stand test, she showed one out of four clues.
- 10) **Inconsistent Travel Direction.** Officer McLean testified that Ms. Strawder provided a description of her travel directions that was inconsistent with what the evidence showed.

The above facts were developed to some degree in the defense's brief from pages 6-11. To create a more comprehensive list of facts supporting probable cause adduced from the hearing, the State suggests some additional items, less fully developed in the defense brief: (a) downed street sign(s) as Ms. Strawder's vehicle appeared to have driven up over a cul-de-sac; (b) airbags deployed on Ms. Strawder's vehicle; (c) Ms. Strawder's vehicle found at a dead stop in the middle of two lanes of traffic; (d) time of the car accident was approximately 2 am after Ms. Strawder attended a party at a friend's home; (e) Ms. Strawder's version of the accident which ran contrary to the physical evidence; and (f) Ms. Strawder's glossy eyes.

Coupled with Ms. Strawder's misrepresentations concerning her alcohol consumption and poor performance on field sobriety tests, the State's position is that this quantum of evidence meets the burden of showing that the totality of circumstances supported a finding of probable cause, that is, that a reasonable police officer would believe Ms. Strawder probably committed the crime of operating a motor vehicle while intoxicated. The seriousness of a 2 am car accident, in and of

itself, presents a substantial evidentiary obstacle for any police officer to ignore the obvious possibility of intoxication.

Much as it did during the hearing, the defense raised other non-existent factors. The defense dubs these as more “tried and true indicia” of drunk driving (Defense brief:9). While not part of the totality of these circumstances in this case, the defense believes its strongest position is to raise facts not present. This becomes sort of a “let’s focus on what was not part of the totality of circumstances” argument to persuade the court to find the arrest devoid of probable cause. Because experienced lawyers and judges are accustomed to seeing the same allegations in drunk driving cases over and over again – bloodshot glassy eyes, slurred speech, odor of intoxicants, and unsteady gait – the defense capitalizes upon the absence of these more recognizable features commonly associated with OWI police investigations.

While the defense brief cites *State v. Lange*, it did not quote the following paragraph from Justice Abrahamson’s opinion:

Although evidence of intoxicant usage such as odors, an admission, or containers ordinarily exists in drunk driving cases and strengthens the existence of probable cause, such evidence is not required. The totality of the circumstances is the test. The reasonable inference to be drawn from the facts in the present case is the one the officers drew: The defendant was impaired by an intoxicant.

State v. Lange, 2009 WI 49, ¶ 37, 317 Wis. 2d 383, 766 N.W.2d 551.

Nonetheless, the defense brief recounts that the citizen witness who flagged down Officer McLean stated that Ms. Strawder also relayed the alleged presence of a second vehicle to him. (R. 13:14,15). Defense counsel obtained this detail during his cross examination. While the point may not be especially significant, the defense seeks a two-fold impression: 1) the State somehow avoided the point during direct examination, and 2) Ms. Strawder, whose credibility was at issue given that she misrepresented her consumption of alcohol, at least provided a consistent version of the alleged existence of a second vehicle. However, given Ms. Strawder’s inability to provide further details

about the alleged second vehicle, the point heightens skepticism. Any reasonable police officer would question whether a driver who lied about alcohol consumption might also be lying about the alleged existence of a second vehicle. Without any details or vehicle description, questions surface about the second vehicle's existence and/or Ms. Strawder's ability to perceive her surroundings, perhaps due to impairment.

The defense claims no attempt was made to identify whether any of roadway debris belonged to the alleged second car (Defense brief:9); however, the defense does not remind this Court of Ms. Strawder's inability to describe this alleged second car. The defense brief recounts cross examination highlighting what debris in the road belonged to which car (R. 13:19-20), perhaps desiring this Court to attribute the debris to the alleged second car rather than Ms. Strawder's vehicle, which had extensive front-end damage and was the likeliest source of the debris.

Regarding the debris testimony, the defense informs this Court that Officer McLean's testimony was "rendered based on incomplete information" and "upon assumptions". (Defense brief:9). However, no evidence existed to suggest that Ms. Strawder, herself, ever attributed debris to an alleged second car.

Certainly, if a second car existed, that second car presumably needed to be in an operable condition in order to then flee the scene (whereas the airbag deployment rendered Ms. Strawder's vehicle undrivable). With zero description of this alleged second car, Officer McLean had little information to go on. Plus, he testified that the trail of debris led back to Ms. Strawder's vehicle.

Next, the defense brief construes that Officer McLean "conceded" a downed stop sign as having possibly resulted from "the phantom vehicle's contact". (Defense brief:9). However, the defense does not squarely address the common sense conclusion upon which any reasonably objective police officer might arrive: *That colliding with the stop sign was the likely impetus for the airbag deployment on Ms. Strawder's vehicle.* The probable cause

test involves what a reasonable police officer might believe based upon the totality of circumstances. For that reason, the “downed stop sign” point likely works against Ms. Strawder’s position.

No explanation is provided in Ms. Strawder’s response brief as to her version of the amount of alcohol (defense brief states “a drink” at page 7) she claimed to have consumed. Later, her intoximeter results registered a .19 BAC result. Comparing her reported consumption of “a drink” with her BAC results, an inconsistency emerges. Common sense tells us that a single alcoholic beverage is unlikely to cause such a high blood alcohol concentration in a person’s blood stream. The defense provides no explanation for the discrepancy.

Claiming that Officer McLean “continually challenged” Ms. Strawder, the defense fails to address why a reasonable police officer might be forced to double and triple check inconsistencies between a citizen’s version of events and evidence observed at the accident scene. Here, perhaps “continuous” challenges were necessary because Ms. Strawder’s narrative did not match the evidence. Follow up questions would not have been necessary had Officer McLean received a logical, cohesive account detailing the physical evidence found at the scene.

In its fact section, the defense argues that Officer McLean “conceded” that “significant tried and true indicia” of drunk driving were missing, of which then appears a list (Defense brief;10-11). Again, the defense seeks to have this Court consider what might have been, had these facts existed to be added to the totality of circumstances. However, a police officer making an arrest is not required to draw a reasonable inference that favors innocence when there is also a reasonable inference that favors probable cause. *See State v. Nieves*, 2007 WI App 189, ¶14, 304 Wis. 2d 182, 738 N.W.2d 125 (Ct. App. 2007).

While perhaps the “tried and true indicia” points may be persuasive to a jury, probable cause decisions require our judiciary to assess the quantum of evidence within the arresting officer’s knowledge at the time of the arrest which would lead a reasonable police officer to believe the defendant committed or

was committing a crime. It is more than a possibility or suspicion but not beyond a reasonable doubt or even that guilt is more likely than not. *See State v. Secrist*, 224 Wis. 2d 201, ¶19, 589 N.W.2d 387 (1999). Probable cause is decided case by case. *See Washburn County v. Smith*, 2008 WI 23, 308 Wis. 2d 65, 746 N.W.2d 243 (2008). If there are two inferences, one justifying arrest and one not, the officer can rely on the inference justifying arrest. *See State v. Kutz*, 203 WI App 205, 267 Wis. 2d 531, 671 N.W.2d 660 (Ct. App. 2003).

B. Response to Defense's Argument Sections

While the parties differ on the proper characterization of certain facts, there appears to be some consensus. In terms of legal analysis, no one contests the following points:

- 1) Investigation. There was a lawful reason for Officer McLean to be present at the scene and investigating.
- 2) Field Sobriety Tests. There were lawful reasons for field sobriety tests. The circuit court ruled as such.

However, a close review of the defense brief's argument section reveals that the defense is silent on the State's main contention: *That the Circuit Court made a delineation. It departed from the totality of the circumstances benchmark analysis. It applied some facts to a "reasonable suspicion to stop" analysis, and then, a second group of facts to its "probable cause to arrest" analysis.* This is the main reason the State appealed this case. On two occasions, error occurred when the trial court stated that the "*only thing*" (R. 13:56, italics added) it could factually rely upon for probable cause was the HGN field sobriety test. That is not a proper application of the law.

Instead of addressing the main issue, the defense enumerates general law pertaining to probable cause (Defense brief, p. 10-13) before providing its interpretation of the trial court's statement: "And I believe that the officer had probable cause to believe that she was intoxicated", arguing the trial court meant to refer to probable cause associated with PBT tests. (Defense brief, p. 13-15). Next, the defense analyzes the trial court's application of the "totality of the circumstances" standard,

quoting *State v. Hall*, to argue that the court provided adequate reasoning and explanation for its discretionary decision. (Defense brief, p. 17). The defense then returns to its list of non-existent facts. (Defense brief, p. 18).

The defense argued two final issues. First, the defense maintained that, in pointing out that the record is devoid of details concerning Ms. Strawder's ankle injury, the State engaged in "burden shifting" as the trial court suppressed two of three field sobriety tests. (Defense brief, p. 18-19). Secondly, the defense attacked the credibility of Officer McLean when addressing the inevitable discovery doctrine, raised by the State in a footnote. This issue pertains to knowledge of Ms. Strawder's two prior drunk driving offenses. (Defense brief, p. 19-21).

While the State stands by arguments made in its first brief, the defense response brief never directly addressed the State's main contention: *That the Circuit Court made an improper delineation that resulted in a misapplication of the totality of the circumstances benchmark.* A reviewing court examines the **totality of the circumstances** to determine whether probable cause exists. *State v. Lange*, 2009 WI 49, ¶ 20, 317 Wis. 2d 383, 766 N.W.2d 551 (boldface print added).

The trial court should have considered all information available to the officer before deciding whether a *reasonable police officer* had sufficient facts to believe that the driver was probably under the influence of an intoxicant when operating her motor vehicle. Here, after applying the first set of facts to a "reasonable suspicion to arrest" analysis, the trial court discounted the other field sobriety tests and then left the rest of Officer McLean's testimony concerning the entire situation and totality of the circumstances out of its analysis.

For the purposes of determining probable cause, the trial court formed its ruling on the basis of one isolated single factor, the HGN field sobriety test. However, Officer McLean explained that, in addition to results from the HGN test, many other factors led him to form the conclusion that Ms. Strawder was intoxicated.

Probable cause may be found even when routine and ordinary “evidence of intoxicant usage” does not exist because the test is totality of the circumstances. *Id.* at ¶137. It is enough if a reasonable officer believes that guilt is more than just a possibility. *Village of Elkhart Lake v. Borzyskowski*, 123 Wis. 2d 185, 189, 366 N.W.2d 506, 508 (Ct. App. 1985). It is sufficient that the evidence known to [the officer] would lead a reasonable police officer to believe that the defendant probably was under the influence of an intoxicant while operating his vehicle.” *State v. Lange*, 2009 WI 49, ¶138, 317 Wis. 2d 383, 399, 766 N.W.2d 551, 558.

Here, a “reasonable suspicion to stop” analysis was largely unnecessary. It would have been irresponsible for any police officer not to stop, attempt to render aid, or investigate the circumstances at the scene of any serious accident. Officer McLean found probable cause on the basis of all the facts known to him. Yet, in its findings of fact, the trial court seemed to bifurcate different portions of these facts, somehow creating two different “totalities” – one “totality” to substantiate its reasonable suspicion to stop analysis – and then, a second “totality” to apply a single field sobriety test to undermine Officer McLean’s probable cause to arrest. Because the State believes this analysis to involve a misapplication of the legal standard, the State respectfully asks this Court to overturn the trial court’s decision.

CONCLUSION

The State respectfully asks this Court to determine that Ms. Strawder's arrest was supported by probable cause, reverse the trial court's decision, and remand for further proceedings.

Dated this 15th day of August, 2023.

Respectfully submitted,

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Electronically Signed by:

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The word count of this brief is 3,000 words.

Dated this 15th day of August, 2023.

Electronically signed by:

Paul Dedinsky
PAUL DEDINSKY
Assistant District Attorney

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 15th day of August, 2023.

Electronically Signed by:

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